

Chapter 7:

Fees

A. Search and Preparation Fees

Under SG §10-621(b), an official custodian may charge reasonable fees for the search and preparation of records for inspection and copying. Search and preparation fees are to be reasonably related to the actual costs to the governmental unit in processing the request. SG §10-621(a); see also 71 Opinions of the Attorney General 318, 329 (1986) (“[t]he goal ... should be ... neither to make a profit nor to bear a loss on the cost of providing information to the public”). Fees may not be charged, however, for the first two hours of search and preparation time. SG §10-621(c).

Search fees are the costs to an agency for locating requested records. Usually, this involves the cost of an employee’s time spent in locating the requested records. Preparation fees are the costs to an agency to prepare a record for inspection or copying, including the time needed to assess whether any provision of law permits or requires material to be withheld. For example, where a document contains both information that the public is entitled to see and information that the custodian may not by law release, an employee’s time will be needed to prepare and copy the record with the exempt information deleted. Redaction will often be necessary where records contain investigatory or confidential financial information. Agencies should decide in advance what method they will use to charge for the time devoted to search and review.

On a rare occasion, a requester (or group of requesters) may attempt to artificially break a large request into a series of smaller requests to obtain two free hours searching for each request in order to circumvent the assessment of fees. If the purpose is clear, it seems reasonable for the agency to aggregate those requests as a single request with the appropriate fee. On the other hand, nothing in the Act prohibits a requester from making multiple requests and an agency should not artificially aggregate separate requests to increase the fee to discourage those requests.

Although the PIA does not address the issue of prepayment of fees, agency regulations may do so. The Court of Appeals has indicated that an agency may appropriately require prepayment of fees. *Ireland v. Shearin*, 417 Md. 401, 412 en.8, 10 A.3d 754 (2010) (agency may require inmate to prepay fees for copies when inmate is

unable to inspect records personally due to incarceration). Following the model regulations in Appendix D, many agencies require prepayment or a commitment to pay fees prior to copying records to be disclosed. See, e.g., COMAR 08.01.06.11D(2) (Department of Natural Resources); COMAR 09.01.04.14D (Department of Licensing and Regulation). Federal agencies typically have regulations requiring prepayment or an agreement to pay fees as a prerequisite to the processing of a request, at least when fees are expected to exceed a set amount. See, e.g., 16 C.F.R. §4.8(d)(3) (Federal Trade Commission); 43 C.F.R. §2.18 (Department of the Interior). See *Pollack v. Department of Justice*, 49 F.3d 115 (4th Cir.), cert. denied, 516 U.S. 843 (1995) (when requester refused to commit to pay fees in accordance with agency's regulations, agency had authority to stop processing FOIA request); *Stout v. United States Parole Comm'n*, 40 F.3d 136 (6th Cir. 1994) (an agency's regulation requiring payment of fees before release of already processed records was proper and did not violate FOIA); *Farrugia v. Executive Office for United States Attorneys*, 366 F.Supp. 2d 56 (D.D.C. 2005) (agency may require payment of search fee before sending records to requester).

B. Reasonable Fees for Copies

An official custodian may charge a "reasonable fee" for copies. SG §10-621. "Reasonable fee" is defined as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." SG §10-621(a). Fees should not be set simply to deter requests to inspect records or get copies.

Many agencies have standard schedules of fees for copies. For example, the Department of Agriculture charges 15¢ per page for a copy of a record. COMAR 15.01.04.14. Agencies should adopt standard fee schedules so that the public and agency employees know what charges will be made. Note that if another law sets a fee for a copy, printout, or photograph, that law applies. SG §10-621(d)(1).

C. Waiver of Fees

An applicant may ask the agency for a total or partial waiver of fees. Under SG §10-621(e), the official custodian may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if the official custodian determines that a waiver would be in the public interest.

To determine whether a waiver is in the public interest, the official custodian must consider not only the ability of the applicant to pay, but also other relevant factors. A waiver may be appropriate, for example, when a requester seeks information for a

public purpose rather than a narrow personal or commercial interest. In one case, the Court of Special Appeals found that Baltimore City's denial of a reporter's request to waive fees was arbitrary and capricious because the City only considered the expense to itself and the ability of the newspaper to pay and did not consider other relevant factors. The Court suggested that relevant factors included the public benefit in making available information concerning one of the City's major financial undertakings and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on the full exercise of freedom of the press. *City of Baltimore v. Burke*, 67 Md. App. 147, 506 A.2d 683, cert. denied, 306 Md. 118, 507 A.2d 631 (1986); see also 81 Opinions of the Attorney General 154 (1996) (waiver of fee depends on a number of relevant factors and cannot be based solely on the poverty of the requester or the cost to the agency).

In deciding whether to waive a fee, an official custodian may find it helpful to look at case law interpreting the comparable FOIA provision, 5 U.S.C. §552(a)(4)(A). In one useful case, *Project on Military Procurement v. Dept. of Navy*, 710 F. Supp. 362 (D.D.C. 1989), the federal court identified as material factors the potential that the requested disclosure would contribute to public understanding and the significance of that contribution. See also *Larson v. CIA*, 843 F.2d 1481 (D.C. Cir. 1988) (requester of information under FOIA seeking fee waiver must not have commercial interest in disclosure of information sought and must show that disclosure of information would be likely to contribute significantly to public understanding of government operations or activities); *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C. Cir. 1987) (fee waiver requests under FOIA grounded on public interest theory must show connection between material sought and matter of genuine public concern and must also indicate that fee waiver or production will primarily benefit public); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 882 F. Supp. 1158 (D. Mass. 1995) (agency justified in denying request for fee where disclosure was not likely to contribute significantly to public understanding of government operations). Cf. *Diamond v. FBI*, 548 F. Supp. 1158 (S.D.N.Y. 1982) (court overturned agency's decision denying fee waiver).